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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 BENJAMIN C. BAIRD,

11 Plaintiff,

12 v.

13 RICHARD J. EHLERS, et al.,

14 Defendants.

CASE NO. C10-1540JLR

ORDER ON DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT AND PLAINTIFF'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT

15 **I. INTRODUCTION**

16 Before the court are two motions: Defendants Richard J. Ehlers ("Deputy Ehlers")  
17 and King County's motion for summary judgment (Dkt. # 24), and Plaintiff Benjamin C.  
18 Baird's motion for partial summary judgment or in the alternative motion *in limine*. (Dkt.  
19 # 21). Defendants seek summary judgment (1) declaring that Defendant Deputy Richard  
20 C. Ehlers is entitled to qualified immunity with respect to Mr. Baird's 42 U.S.C. § 1983  
21 claim, (2) dismissing Mr. Baird's state law claim for assault, and (3) dismissing Mr.  
22 Baird's claim for damages arising out of his broken clavicle. Defendants also seek to

1 exclude Mr. Baird's police procedures expert from testifying at trial. Mr. Baird has  
2 moved for partial summary judgment with regard to Defendants' defense that Mr. Baird  
3 injured his clavicle after he was placed in jail following his encounter with Deputy Ehlers,  
4 or *in limine* to exclude any evidence of a fall by Mr. Baird at the jail.

5 Following the oral argument of counsel on November 16, 2011, the court stated on  
6 the record its intention to grant Defendants' motion declaring that Deputy Ehlers is  
7 entitled to qualified immunity with respect to Mr. Baird's 42 U.S.C. § 1983 claim. On  
8 November 17, 2011, the parties filed a stipulated motion dismissing Mr. Baird's state law  
9 claims, without prejudice to Mr. Baird's right to appeal the court's ruling on qualified  
10 immunity. (Dkt. # 52.) The court's order granting the parties' stipulated motion (Dkt. #  
11 53) renders Mr. Baird's motion moot, and the court therefore DENIES it as MOOT (Dkt.  
12 # 21). The order also renders much of the relief sought in Defendants' motion moot,  
13 including the dismissal of Mr. Baird's state law claims, the dismissal of Mr. Baird's claim  
14 for damages arising out of his broken clavicle, and the exclusion of Mr. Baird's police  
15 procedures expert from testifying at trial. Accordingly, the court DENIES these portions  
16 of Defendants' motion as MOOT as well. The only aspect of the forgoing motions that  
17 remains for the court to decide is Defendants' motion concerning the issue of qualified  
18 immunity.

19 Having carefully considered Defendants' motion for qualified immunity, all  
20 documents filed in support and opposition thereto, the applicable law, and having heard  
21 the oral argument of counsel on November 16, 2011, the court GRANTS Defendants'  
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1 motion establishing on summary judgment the qualified immunity of Deputy Ehlers with  
2 respect to Mr. Baird's 42 U.S.C. § 1983 claim.

## 3 **II. FACTUAL AND PROCEDURAL BACKGROUND**

### 4 **A. Procedural History**

5 Mr. Baird initiated this action in King County Superior Court on September 2,  
6 2010. (Not. of Removal (Dkt. # 1) Ex. A (Compl.).) Mr. Baird alleged a violation of his  
7 federal civil rights pursuant to 42 U.S.C. § 1983,<sup>1</sup> and state law claims for false arrest,  
8 assault, and malicious prosecution, arising out of a confrontation on November 23, 2009,  
9 between himself and Deputy Ehlers, who is a King County Sheriff's Deputy. (*Id.*) On  
10 September 24, 2010, Defendants removed the action to Federal District Court for the  
11 Western District of Washington. (*Id.*) Mr. Baird subsequently voluntarily dismissed his  
12 state law claims for false arrest and malicious prosecution. (Dkt. # 18.) As discussed  
13 above, on November 17, 2011, the parties' filed a stipulated motion for dismissal of Mr.  
14 Baird's state law claims, and the court granted it. (Dkt. ## 52, 53.) Thus, the only claim  
15 remaining at summary judgment is Mr. Baird's § 1983 claim against Deputy Ehlers.

### 16 **B. The Events of November 23, 2009**

17 There is no dispute that Mr. Baird spent most of his day on November 22, 2009,  
18 consuming alcohol, and that by the time he encounters Deputy Ehlers on a metro bus  
19 shortly after midnight on November 23, 2009, Mr. Baird is in a "drunken stupor." (*See*

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21 <sup>1</sup> Mr. Baird did not allege a § 1983 claim against King County. (*See* Not. of Removal ¶ 3  
22 & Ex. A (Compl.) ¶ 6.1.)

1 | Plaintiff. Resp. (Dkt. # 36) at 2 (“There is no dispute that Mr. Baird was drunk, marginally  
2 | responsive and that he was staggering . . . .”); Bundy Decl. (Dkt. # 25) Ex. 1 (Baird Dep.)  
3 | at 32 (“ . . . I’m in a . . . the honest word I can say is a drunken stupor . . . .”).) Mr. Baird  
4 | has testified that during portions of the relevant interactions between himself and Deputy  
5 | Ehlers he “was just kind of like in a daze,” that he “[does not] remember talking with a  
6 | policeman,” and that he “[does not] know what’s going on.” (*Id.* at 29, 32.) Despite Mr.  
7 | Baird’s inability to provide meaningful testimony concerning many of the events on  
8 | November 23, 2009, Mr. Baird’s counsel asserts that a videotape of the encounter between  
9 | Mr. Baird and Deputy Ehlers “shows conflicting facts from those presented by Deputy  
10 | Ehlers.” (Plaint. Resp. at 2.) Accordingly, the court views the facts as depicted by the  
11 | videotape, and with regard to the Defendants’ motion for summary judgment views the  
12 | remainder of the evidence in the light most favorable to Mr. Baird.<sup>2</sup>

13 |       There is no dispute that on November 22, 2009, after drinking for much of the day,  
14 | Mr. Baird boards a metro bus and rides it to the end of the bus line in Tukwila,  
15 | Washington. The events on the bus are recorded via videotape, which includes four  
16 | camera locations. (Bundy Decl. Ex. #3 (Video).) The bus reaches its destination a few  
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18 |       <sup>2</sup> In the context of a motion for summary judgment, the court “must credit the video  
19 | evidence submitted by [the parties], and consider all evidence in the light most favorable to [the  
20 | non-moving party].” *Menotti v. City of Seattle*, 409 F.3d 1113, 1150 (9th Cir. 2005) (on summary  
21 | judgment, the court “must credit the video evidence submitted by [the non-moving party], and  
22 | consider all evidence in the light most favorable to [the non-moving party]”); *Fillmore v. Sharp*,  
No. 2:10cv00620 JWS, 2011 WL 5191369 (D. Ariz. Nov. 2, 2011) (“Where video evidence  
contradicts a party’s version of the events, on a motion for summary judgment a court must accept  
the facts as depicted by the video . . . .”) (citing *Scott v. Harris*, 550 U.S. 372, 379, 380-81  
(2007)).

1 minutes before midnight, and all of the passengers exit the bus except for Mr. Baird. (*Id.*  
2 Ex. 3 (Video) Camera One at 23:56:40.)

3         Once the driver, Ms. Kimber Dale, realizes that Mr. Baird has not exited the bus  
4 with the other passengers, she shouts at him repeatedly that he needs to get off the bus.  
5 (Bundy Decl. Ex. 3 (Video) Camera One at 23:58:59 and following; Camera Two at  
6 23:57:58 and following; *see* Dale Decl. (Dkt. # 29) at ¶2.) On the video, Mr. Baird does  
7 not appear to be unconscious, but does not respond in any meaningful way to Ms. Dale's  
8 repeated instructions either. Accordingly, Ms. Dale calls for assistance. (Dale Decl. at ¶  
9 2.)

10         Approximately ten minutes later, Deputy Ehlers enters the bus from behind where  
11 Mr. Baird is seated, approaches Mr. Baird and tells him that he needs to get off the bus.  
12 (Bundy Decl. Ex. 3 (Video) Camera Two at 00:12:49 and following.) Deputy Ehlers has  
13 testified that he could smell that Mr. Baird had been drinking. (Ehlers Decl. (Dkt. # 26) ¶  
14 2.) Again, although he does not appear to be unconscious, Mr. Baird does not reply to  
15 Deputy Ehlers instructions in any meaningful way, and does not comply with Deputy  
16 Ehlers's orders to exit the bus. (Bundy Decl. Ex. 3 (Video) Camera Two at 00:12:49 and  
17 following.) Deputy Ehlers proceeds to lift Mr. Baird out of his seat, place Mr. Baird in an  
18 escort hold known as a gooseneck counter-joint lock, and maneuver Mr. Baird off the bus.  
19 (Ehlers Decl. at 2; Bundy Decl. Ex. 3 (Video) Camera Two at 00:13:04.)

20         Deputy Ehlers has testified that Mr. Baird physically resisted his efforts to remove  
21 him from the bus. (Ehlers Decl. at 2.) However, viewing the video evidence, Mr. Baird's  
22 physical response, or lack thereof, to Deputy Ehlers's efforts to maneuver him off the bus

1 could be interpreted merely as his extreme intoxication, and not as an effort to  
2 affirmatively resist Deputy Ehlers's attempts to remove him from the bus. (Bundy Decl.  
3 Ex. 3 (Video) Camera Two at 00:13:06 and following; Camera One at 00:13:14 and  
4 following.) In addition, Mr. Baird's free arm remains at his side, which would appear to  
5 be inconsistent with any effort on Mr. Baird's part to actively resist Deputy Ehlers. (*Id.*)  
6 Richard Wolf, a bystander who observed a portion of the altercation between Mr. Baird  
7 and Deputy Ehlers, has also testified that, at this point in the course of events, Mr. Baird  
8 was not struggling with Deputy Ehlers, was resisting "maybe more with body language  
9 than actually physically," and appeared "hung over" and a little woozy. (Bundy Decl. Ex.  
10 9 (Wolf Dep.) at 15.)

11       Once Deputy Ehlers succeeds in getting Mr. Baird off the bus, Deputy Ehlers  
12 testifies that Mr. Baird suddenly turns towards him and that he took this movement as a  
13 threat to his safety.<sup>3</sup> (Ehlers Decl. ¶ 4; Bundy Decl. Ex. 3 (Video) Camera One at  
14 00:13:24 – 00:13:25.) Deputy Ehlers has testified that he responded to this alleged threat  
15 by "immediately and instinctively grabb[ing] Mr. Baird," "push[ing] him over [his] knee,"  
16 and "tripping him to the ground." (*Id.*) Deputy Ehlers has also testified that he  
17 "controlled [Mr. Baird's] fall, guiding him to the ground so that he did not hit with the full  
18 force of his significant body weight." (*Id.*)

19       The video evidence is consistent with Deputy Ehlers's testimony concerning his  
20 own movements and the controlled manner in which he guided Mr. Baird to the ground.

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22       <sup>3</sup> Mr. Wolf has also testified that Mr. Baird was "struggling" and starting to be  
"uncooperative" at this point in the altercation. (Bundy Decl. Ex. 9 (Wolf Dep.) at 15, 16.)

1 (Bundy Decl. Ex. 3 (Video) Camera One at 00:13:22 and following.) The video, however,  
2 could be interpreted contrary to Deputy Ehlers's testimony with regard to Mr. Baird's  
3 movements. (*Id.*) Once again, Mr. Baird's movements could be interpreted simply as  
4 consistent with his extreme state of inebriation, rather than as an attempt to threaten or  
5 harm Deputy Ehlers. (*Id.*) Further, Mr. Baird again makes no use of his free arm during  
6 this period of time, which would also seem inconsistent with an effort to threaten or  
7 deliberately struggle with Deputy Ehlers. (Bundy Decl. Ex. 3 (Video) Camera One at  
8 00:13:20-25.) Indeed, Deputy Ehlers admits that, although Mr. Baird had a free hand at  
9 the time, Mr. Baird did not take a swing at him. (Diamondstone Decl. (Dkt. # 35) Ex. 5  
10 (Ehlers Dep.) at 15.)

11 The videotape indicates that as he was escorting Mr. Baird off the bus, Deputy  
12 Ehlers repeatedly tells Mr. Baird to "get up, get up." His last directive to Mr. Baird to  
13 "get up" is recorded on the videotape at 00:13:21-22. (Bundy Decl. Ex. 3 (Video) Camera  
14 One at 00:13:21-22.) Deputy Ehlers then instructs Mr. Baird to "calm down." (*Id.* at  
15 00:13:24; Diamondstone Decl. Ex. 5 (Ehlers Dep.) at 15.) However, he maneuvers Mr.  
16 Baird to the ground within just one or two seconds of that new directive. (*Id.* at 00:13:23-  
17 25.)

18 Deputy Ehlers has testified that once Mr. Baird was on the ground, Mr. Baird  
19 immediately tried to kick and punch him. (Ehlers Decl. ¶ 4.) In reaction, Deputy Ehlers  
20 testifies that he let go of his hold on Mr. Baird and stepped back, and that Mr. Baird then  
21 jumped to his feet. (*Id.*) Mr. Baird, however, describes his reaction to Deputy Ehlers's  
22 maneuver differently:

1 . . . [M]y reaction is, What's going on? Because I'm in a – like a – you  
2 know, like a – you know, to be – the honest word I can say is a drunken  
3 stupor. I was kind of half asleep and my reaction is I don't know if I'm  
4 being attacked because I don't remember talking with a policeman. I don't  
5 know what's going on. I'm shocked. So my natural reaction is to get back  
6 on my feet again.

7 (Bundy Decl. Ex. 1 (Baird Dep.) at 32.) The video evidence in this case can be interpreted  
8 consistently with either Mr. Baird's testimony or Deputy Ehlers's testimony. (Bundy  
9 Decl. Ex. 3 (Video) Camera One at 00:13:25-00:13:28.) However, Mr. Baird's  
10 movements on the ground and reaction in standing back up are consistent with Mr. Baird's  
11 testimony concerning his state of drunkenness, surprise, and confusion as to what is  
12 transpiring, rather than an attempt to assault Deputy Ehlers.

13 Once Mr. Baird jumps up, he shouts at Deputy Ehlers and says, "Mother fucker, I'll  
14 get up. I'll get up. I'll stand up." (Bundy Decl. Ex. 3 (Video) Camera One at 00:13:28-  
15 38.)<sup>4</sup> At this point in the altercation, the video evidence records Mr. Baird's movements,  
16 but the view of Deputy Ehlers is obscured in part by the structure of the bus. Deputy  
17 Ehlers is standing approximately six feet away from Mr. Baird (Diamondstone Decl. Ex. 5  
18 (Ehlers Dep.) at 15), and the two men are facing each other. Contrary to Deputy Ehlers's  
19 report (Ehlers Decl. (Dkt. # 26) Ex. 1), which asserts that Mr. Baird was yelling with his  
20 hands clenched in fists, the video evidence is clear that Mr. Baird's hands are open, his  
21 arms are outstretched perpendicular to his sides, and raised to just below his shoulder  
22 level. (Bundy Decl. Ex. 3 (Video) Camera One at 00:13:30-38.) As they are standing

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<sup>4</sup> Mr. Baird's counsel asserts that since this is the last directive given to Mr. Baird by  
Deputy Ehlers, Mr. Baird's statements cannot be interpreted as non-compliant or resistant.  
(Plaint. Resp. at 4.)



1 facing each other, Mr. Baird makes no effort to move towards Deputy Ehlers, neither does  
2 he make any effort to turn and flee. (*Id.*) Deputy Ehlers admits these facts:

3 Q: Mr. Baird, in what we've seen, wasn't attempting to flee at any time,  
was he?

4 A: Not that I know of.

Q: Mr. Baird wasn't charging towards you, was he?

5 A: Actually, I was backing away. But he had not charged towards me.

Q: At any time did he charge towards you?

6 A: Not that I recall, no.

Q: At any time did he strike you?

7 A: No, he did not strike me.

8 (Diamondstone Decl. Ex. 3 (Ehlers Dep.) at 59-60.)<sup>5</sup>

9  
10 <sup>5</sup> Another eyewitness, Amber Harner testified concerning the time period that Mr. Baird  
and Deputy Ehlers were facing each other as follows:

11 Q: . . . When the man was not complying and just standing there, did you see any  
movement or gestures by the man at all?

12 A: No.

Q: Did you see him approach the officer?

13 A: No.

Q: Did you see him ball up his fists?

14 A: No.

Q: Did you hear him threaten the officer in any way?

15 A: No.

Q: Did you see him try to flee?

16 A: No.

Q: You did see that he wasn't getting down to the ground as directed by the  
officer?

17 A: Yes.

Q: And that's the extent of the resistance that you saw at that point?

18 A: Yes.

19 (Diamondstone Decl. Ex. 4 (Harner Dep.) at 22-23.) In addition, the eyewitness testimony of  
Richard Wolf is consistent with the foregoing:

20 Q: At the time the officer fired the taser at the man, were the man's hands – did  
you see the man's hands?

21 A: Yes.

Q: And what position were they in?

22 A: They were outstretched. He said, "Do it."

1 Deputy Ehlers, nevertheless, pulls out his taser. (Ehlers Decl. ¶ 3.) In response,  
2 Mr. Baird does not move either toward or away from Deputy Ehlers, but begins to shout,  
3 “Do it – Do it – Do it – Do it.” Deputy Ehlers then tells Mr. Baird to “sit down.” (Bundy  
4 Decl. Ex. 3 (Video) Camera One at 00:13:36-37; Ehlers Decl. ¶ 4.) Within just a second  
5 or two of giving the command, however, Deputy Ehlers fires his taser, and it hits Mr.  
6 Baird in the chest. (Ehlers Decl. ¶ 4 (“I . . . pulled out my [t]aser and, shortly after telling  
7 him to sit down, I deployed it, hitting him in the chest with the darts.”); Bundy Decl. Ex. 3  
8 (Video) Camera One at 00:13:28-38.) There was insufficient time for Mr. Baird to  
9 comply with Deputy Ehlers’s instruction to sit down before Deputy Ehlers fired his taser.

10 According to Deputy Ehlers testimony, the taser dart did not disable Mr. Baird.  
11 (Ehlers Decl. ¶ 5.) On the videotape, Mr. Baird continues to stand in his same position,  
12 and appears to begin to pull the taser darts out of his chest. (*Id.* at 00:13:38-40.) Mr.  
13 Baird’s expert witness on police practices, however, has testified that although Mr. Baird  
14 did not fall to the ground, he was disabled by the initial taser strike. (Bundy Decl. Ex. 17  
15 (Burwell Dep.) at 31.) After firing his taser, Deputy Ehlers immediately moves toward  
16 Mr. Baird, applies his taser to Mr. Baird’s leg in drive-stun mode, while at the same time  
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19 Q: As his hands were outstretched, was he threatening the officer?

A: No.

20 Q: Did he appear that he was about to flee?

A: No.

21 (Bundy Decl. Ex. 9 (Wolf Dep.) at 22.)  
22

1 using his body to push or tackle Mr. Baird to ground. (*Id.* at 00:13:40 and following;  
2 Ehlers Decl. ¶ 5.) The ensuing scuffle between Mr. Baird and Deputy Ehlers occurs  
3 outside of the video camera's range, but Deputy Ehlers has testified that Mr. Baird resisted  
4 his efforts to place him in handcuffs, and so he activated his taser two more times. (*Id.*)  
5 Following these two additional taser activations, Deputy Ehlers was able to place Mr.  
6 Baird in handcuffs. (*Id.*) The total time between when Deputy Ehlers first fires his taser  
7 until Deputy Ehlers is able to place Mr. Baird in handcuffs lasts approximately 60 to 75  
8 seconds. (Diamondstone Decl. Ex. 3 (Ehlers Dep.) at 60.) Therefore, in the course of 60  
9 to 75 seconds, Deputy Ehlers applied his taser to Mr. Baird once in dart form, once in  
10 drive-stun mode, and then re-activated his taser two additional times following its initial  
11 application in drive-stun mode to Mr. Baird's leg. (Ehlers Decl. ¶ 5.)

12 Deputy Ehlers arrested Mr. Baird for unlawful bus or transit conduct under RCW  
13 9.91.025. (Not. of Removal Ex. A (Compl.) ¶ 5.1.) Mr. Baird was taken to jail, and later  
14 released from custody without being charged with any crime. (*Id.*) Mr. Baird, through  
15 counsel, subsequently requested records from the King County Sheriff's Office  
16 concerning the events of November 23, 2009. (*Id.* ¶ 5.3.) Shortly thereafter, on March 9,  
17 2010, Mr. Baird was informed that he was being charged with obstruction of a law  
18 enforcement officer for the events of November 23, 2009. (*Id.*) The obstruction charge  
19 was filed in King County District Court. (*Id.*) King County ultimately dismissed the  
20 obstruction charge with prejudice. (*Id.*; *see also* SJ Mot. at 11 n. 3.)  
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### III. ANALYSIS

#### A. Standards

Summary judgment is appropriate if the evidence, when viewed in the light most favorable to the non-moving party, demonstrates “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the initial burden of showing there is no genuine issue of material fact and that he or she is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets his or her burden, then the non-moving party “must make a showing sufficient to establish a genuine dispute of material fact regarding the existence of the essential elements of his case that he must prove at trial” in order to withstand summary judgment. *Galen*, 477 F.3d at 658.

#### B. Qualified Immunity

Qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Mattos v. Agarano*, --- F.3d ---, 2011 WL 4908374, at \*5 (9th Cir. Oct. 17, 2011) (*en banc*) (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). In determining whether an official is entitled to qualified immunity, courts apply a two-step test: First, the court must determine if, taking the facts in the light most favorable to the non-moving party, the officer violated one of the plaintiff’s constitutional rights. Second, if the answer to the first question is “yes,” then the court must “determine whether the constitutional right was ‘clearly established in light

1 of the specific context of the case’ at the time of the events in question.” *Mattos*, 2011  
2 WL 4908374, at \*5 (quoting *Robinson v. York*, 566 F.3d 817, 821 (9th Cir. 2009)); *Bryan*  
3 *v. MacPherson*, 630 F.3d 805, 823 (9th Cir. 2010).

#### 4 **1. Mr. Baird’s Fourth Amendment Rights**

5 Mr. Baird has alleged that Deputy Ehlers violated his Fourth Amendment rights by  
6 using excessive force on February 23, 2009. All allegations that law enforcement officers  
7 have used excessive force are examined under the Fourth Amendment and its  
8 reasonableness standard, and the framework outlined by the Supreme Court in *Graham v.*  
9 *Connor*, 490 U.S. 386 (1989). *Smith v. City of Hemet*, 394 F.3d 689, 700 (9th Cir. 2005)  
10 (*en banc*). The Supreme Court has declared that the “reasonableness” inquiry is whether  
11 the officer’s actions are “objectively reasonable” in light of the facts and circumstances  
12 confronting him. *Graham*, 490 U.S. at 397. The court applies *Graham* by first  
13 considering the nature and quality of the alleged intrusion, and then considering the  
14 governmental interests at stake by looking at: (1) the severity of the crime at issue, (2)  
15 whether the suspect poses an immediate threat to the safety of the officers or others, and  
16 (3) whether he is actively resisting arrest or attempting to evade arrest by flight. *Mattos*,  
17 2011 WL 4908374, at \* 6.

18 The court’s consideration of reasonableness, however, is not limited to these three  
19 factors. Rather, the court must consider the totality of the circumstances and weigh the  
20 gravity of the intrusion against the government’s interest to determine whether the force  
21 employed was constitutionally reasonable. *See Miller v. Clark Cnty.*, 340 F.3d 959, 968  
22 (9th Cir. 2003); *see also Mattos*, 2011 WL 4908374, at \*6 (“[I]n assessing the

1 governmental interests at stake under *Graham*, we are free to consider issues outside the  
2 three enumerated . . . when additional facts are necessary to account for the totality of  
3 circumstances in a given case.”). “Because [the excessive force inquiry] nearly always  
4 requires a jury to sift through disputed factual contentions, and to draw inferences  
5 therefrom, . . . summary judgment . . . in excessive force cases should be granted  
6 sparingly.” *Smith*, 394 F.3d at 701(quoted *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir.  
7 2002)).

8       Like the court in *Mattos*, this court begins its analysis by considering the nature and  
9 quality of the force used against Mr. Baird. *See Mattos*, 2011 WL 4908374, at \*6; *see also*  
10 *Chew*, 27 F.3d at 1441 (stating that the *Graham* factors “are not to be considered in a  
11 vacuum but only in relation to the amount of force used to effect a particular seizure.”).  
12 Initially, Deputy Ehlers used an escort hold known as a gooseneck counter-joint lock,  
13 while escorting Mr. Baird off the bus. (Ehlers Decl. at 2; Bundy Decl. Ex. 3 (Video)  
14 Camera Two at 00:13:04.) Once off the bus, Deputy Ehlers pushed Mr. Baird over his  
15 knee, tripping him to the ground. (Bundy Decl. Ex. 3 (Video) Camera One at 00:13:24 –  
16 00:13:25.) Given Mr. Baird’s conduct and prior Ninth Circuit authority, the court finds  
17 that this minimal use of force was reasonable in light of all the circumstances of this case.  
18 *See, e.g., Tatum v. City and Cnty. of San Francisco*, 441 F.3d 1090, 1096 (9th Cir. 2006)  
19 (officer’s use of control hold to arrest plaintiff and place him in handcuffs was objectively  
20 reasonable where plaintiff disobeyed officer’s commands, was verbally unresponsive, and  
21 appeared to be intoxicated or under the influence of a controlled substance); *see also*  
22 *Forrester v. City of San Diego*, 25 F.3d 804, 807 (9th Cir. 1994) (concluding that ample

1 evidence supported a jury's verdict that the use of “pain compliance techniques” to remove  
2 anti-abortion demonstrators who were blocking access to an abortion clinic was  
3 objectively reasonable).

4       Once Mr. Baird stands up again, however, Deputy Baird significantly escalates the  
5 level of force he employs. He draws and deploys his taser in dart-mode. (Bundy Decl.  
6 Ex. 3 (Video) Camera One at 00:13:28-38.) The Ninth Circuit has “held that tasers used  
7 in dart-mode ‘constitute an intermediate, significant level of force.’” *Mattos*, 2011 WL  
8 4908374, at \*7 (quoting *Bryan*, 630 F.3d at 826). The use of such force must be justified  
9 by the governmental interest that compels its use. *See Bryan v. MacPherson*, 630 F.3d  
10 805, 826 (9th Cir. 2010). When Mr. Baird allegedly began attempting to remove the dart  
11 from his chest, Deputy Ehlers tackles Mr. Baird to the ground and applies his taser to Mr.  
12 Baird’s leg in drive-stun mode. (Bundy Decl. Ex. 3 (Video) Camera One at at 00:13:40  
13 and following; Ehlers Decl. ¶ 5.) Deputy Ehlers has also testified that while his taser was  
14 applied to Mr. Baird’s leg in drive-stun mode, he activated the taser two more times  
15 before successfully placing Mr. Baird in handcuffs.

16       In *Mattos*, the Ninth Circuit declined to determine what level of force specifically  
17 is used when a taser is deployed in drive-stun mode. *Mattos*, 2011 WL 4908374, at \*8.  
18 Nevertheless, the Ninth Circuit proceeded to determine whether the officer’s use of the  
19 taser against the plaintiff was reasonable, “keeping in mind the magnitude of the electric  
20 shock at issue and the extreme pain that [the plaintiff] experienced.” *Id.* Accordingly, this  
21 court also presses forward to examine the *Graham* factors in light of Deputy Ehler’s use  
22 of his taser in both dart-mode and drive-stun form.

1 In evaluating the government's interests at stake, the court considers the first  
2 *Graham* factor, which is the severity of the crime at issue. Deputy Ehlers initially arrested  
3 Mr. Baird for improper bus or transit conduct under RCW 9.91.025. (Not. of Removal  
4 Ex. A (Compl.) ¶ 5.1.) Although the court could not find any Fourth Amendment  
5 excessive force cases involving this particular misdemeanor, the court has no difficulty in  
6 concluding that improper bus conduct is not a serious offense. *See Mattos*, 2011 WL  
7 4908374, at \*8 (noting that failure to sign a traffic citation, trespassing and obstructing a  
8 police officer, were not serious crimes). The court's conclusion is undergirded by the  
9 particular facts of this case. Mr. Baird's conduct did not involve the harassment of other  
10 passengers or the driver, or any activity that placed the operation of the bus in danger.  
11 Rather, his improper conduct consisted simply of his failure to exit the bus at the end of  
12 the line. While Mr. Baird's misconduct was likely inconvenient for the driver and other  
13 passengers (whose bus may have arrived late at subsequent stops), it does not constitute a  
14 serious crime for purposes of Fourth Amendment excessive force analysis.<sup>6</sup>

15 Next, the court considers the second *Graham* factor, which is whether Mr. Baird  
16 posed an immediate threat to the safety of the officer or others. This is the "most  
17 important single element" of the governmental interests at stake. *Mattos*, 2011 WL

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18  
19 <sup>6</sup> Mr. Baird was also later charged with obstructing a law enforcement officer, although  
20 the charge was later dismissed with prejudice. The Ninth Circuit has already specifically  
21 considered this charge in similar factual circumstances, and determined that it is not a serious  
22 offense. *See Brooks v. City of Seattle*, 599 F.3d 1018, 1028 (9th Cir. 2010), *rev'd in part, aff'd in*  
*part on other grounds, Mattos v. Agarano*, --- F.3d ---, 2011 WL 4908374 (9th Cir. 2011) (en  
banc) ("Although obstructing an officer is a more serious offense than [] traffic violations, it is  
nonetheless not a serious crime."); *Davis v. City of Las Vegas*, 478 F.3d 1048, 1055 (9th Cir.  
2007) (crime of obstructing an officer is not a serious offense sufficient to justify severe force).



1 4908374, at \*8 (quoting *City of Hemet*, 394 F.3d at 702). Even if the court were to  
2 assume that Mr. Baird posed a threat to Deputy Ehlers at the time that Mr. Baird suddenly  
3 turned toward the officer after departing the bus, or at the time Mr. Baird allegedly tried to  
4 kick or punch the deputy on the ground, once the two men were standing facing each other  
5 approximately six feet apart the court cannot conclude that Mr. Baird continued to pose  
6 any threat or flight risk. Mr. Baird's arms were outstretched, and his hands were  
7 unclenched and visible. There is no evidence that Mr. Baird carried a weapon or that he  
8 appeared ready to use one. The eyewitness testimony and videotape evidence is consistent  
9 that Mr. Baird was neither threatening the officer nor attempting to flee at this point in  
10 time. (*See* Diamondstone Decl. Ex. 4 (Harner Dep.) at 22-23; Bundy Decl. Ex. 9 (Wolf  
11 Dep.) at 22, Ex. 3 (Video) Camera One at 00:13:30-38.)) Even Deputy Ehlers has  
12 acknowledged these facts. (Diamondstone Decl. Ex. 3 (Ehlers Dep.) at 59-60.) Although  
13 Mr. Baird was yelling at Deputy Ehlers to "Do it! Do it!," this type of verbal provocation  
14 alone cannot justify the officer's use of an intermediate level of force – the use of his taser  
15 in dart form, or the use of his taser in drive-stun mode.

16 The third governmental interest factor in the *Graham* test is whether Mr. Baird was  
17 actively trying to resist arrest or attempting to evade arrest by flight. When Deputy Ehlers  
18 maneuvered Mr. Baird to the ground, Mr. Baird refused to stay there. Deputy Ehlers  
19 could have reasonably interpreted this behavior as resisting arrest. Mr. Baird also engaged  
20 in some leg thrashing while on the ground, which Deputy Ehlers and other witnesses have  
21 described as attempts by Mr. Baird to kick the officer. Mr. Baird, however, has denied  
22 that he tried to kick the officer, and rather testified that when he found himself on the

1 ground he was simply confused about what was going, could not remember talking to an  
2 officer, and so instinctually stood back up. (Bundy Decl. Ex. 1 (Baird Dep.) at 32.) In any  
3 event, the resistance, if any, is mild, and to the extent any resistance existed, it had ceased  
4 by the time Deputy Ehlers initially deployed his taser. *See Smith*, 394 F.3d at 703  
5 (plaintiff who ignored some of the officers' commands, only engaged in minor resistance  
6 because he did not attempt to run from officers and physically resisted for only a short  
7 period of time).

8 In *Mattos*, the Ninth Circuit found that officers may have found a plaintiff's  
9 uncooperative and agitated behavior potentially threatening while she sat in the driver's  
10 seat of her car following a traffic stop with her keys still in the ignition. 2011 WL  
11 4908374, at \*8. However, once the keys were removed from the ignition, she no longer  
12 posed even a potential threat to the officers' safety, "much less an 'immediate threat.'" *Id.*  
13 (citing *Deorle v. Rutherford*, 272 F.3d a1272, 1280 (9th Cir. 2001)). Just as in *Mattos*,  
14 although Mr. Baird may have resisted arrest or posed an earlier threat to Deputy Ehlers  
15 when they scuffled on the ground, by the time Deputy Baird deployed his taser, and Mr.  
16 Baird was standing six feet away with his arms spread and his palms unclenched, he no  
17 longer posed an immediate threat to Deputy Ehlers, and was no longer actively resisting  
18 arrest or attempting to flee.

19 Finally, the court "must examine the totality of the circumstances and consider  
20 'whatever specific factors may be appropriate in a particular case, whether or not listed in  
21 *Graham*.'" *Mattos*, 2011 WL 4908374, at \*8 (quoting *Bryan*, 630 F.3d at 826.) The court  
22 notes that Mr. Baird was admittedly highly intoxicated and his behavior in response to

1 Deputy Ehlers was erratic to say the least. He, therefore, bears some responsibility for the  
2 events as they unfolded here, and his responsibility “influences the totality of these  
3 circumstances.” *See Mattos*, 2011 WL 4908374, at \*9.<sup>7</sup>

4 The court, however, notes an additional factor, which is the number of times that  
5 Deputy Ehlers tased Mr. Baird within the short span of 60-75 seconds. In *Mattos*, the  
6 Ninth Circuit noted that the officer tased the plaintiff “three times over the course of less  
7 than one minute.” *Id.* The Ninth Circuit described this factor as “overwhelmingly  
8 salient,” noting that “[t]hree tasings in such rapid succession provide[s] no time for [the  
9 plaintiff] to recover from the extreme pain . . . , gather [him]self, and reconsider [his]  
10 refusal to comply.” *Id.*; *see also Beaver v. City of Fed. Way*, 507 F. Supp. 2d 1137, 1149  
11 (W.D. Wash. 2007), *aff’d*, 301 Fed. Appx. 704 (9th Cir. 2008) (“[A]ny decision to apply  
12 multiple applications of a Taser must take into consideration whether a suspect is capable  
13 of complying with an officer’s commands.”). Here, Mr. Baird was essentially tased four  
14 times in rapid succession (once in dart-mode, once in drive-stun mode, and two additional  
15 times when Deputy Ehlers reactivated his taser in drive-stun mode). The court must  
16 consider the number of tasings Mr. Baird experienced and the time period in which he  
17 received them in weighing the reasonableness of the force deployed.

18 In short, although Mr. Baird was highly intoxicated and erratic in his behavior, his  
19 alleged offenses were minor. He did not pose an immediate threat to Officer Ehlers’s

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21 <sup>7</sup> For example, Mr. Baird’s extreme intoxication and resulting erratic behavior weighs in  
22 favor of finding Deputy Ehlers’s minimal use of force in removing Mr. Ehlers from the bus and  
placing him on the ground after he had been removed to be objectively reasonable.

1 safety or the safety of others. He was not actively resisting arrest or trying to flee at the  
2 time Deputy Ehlers deployed his taser. Finally, Deputy Ehlers tased Mr. Baird once in  
3 dart form, once in drive-stun mode, and activated his taser two more times in drive-stun  
4 mode – all in rapid succession over approximately 60-75 seconds.

5 The court finds the facts in *Bryan* to be instructive here. In *Bryan*, the plaintiff was  
6 stopped by an officer for failure to wear his seatbelt. The plaintiff was angry with himself  
7 at the prospect of another ticket and hit his steering wheel and yelled expletives to himself.  
8 After pulling his car over, the plaintiff stepped out of his car. The plaintiff was agitated,  
9 standing outside of his car, yelling gibberish, hitting his thighs, and clad only in his boxer  
10 shorts and tennis shoes. He did not verbally threaten the officer, was standing 15 to 25  
11 feet away, and did not attempt to flee. The officer testified that the plaintiff took a step  
12 toward him, while the plaintiff testified that he did not take any steps. The physical  
13 evidence indicates that the plaintiff was actually facing away from the officer. Without  
14 giving a warning, the officer shot his taser and stunned the plaintiff resulting in injuries  
15 when he fell. *See generally, Bryan*, 630 F.3d at 824-32. Although the plaintiff in *Bryan*  
16 was not intoxicated, like Mr. Baird, he was highly agitated and yelling. Further, like Mr.  
17 Baird, he was stopped for a minor offense, was not an immediate risk to the officer, and  
18 was not resisting arrest or attempting to flee. If anything, Deputy Ehlers's use of force, in  
19 tasing Mr. Baird not once, but essentially four times in rapid succession, was less  
20 justifiable than the single taser deployment in *Bryan*.

21 Based on the totality of these circumstances, a reasonable fact-finder, taking the  
22 evidence in the light most favorable to Mr. Baird, could conclude that Deputy Ehlers's use

1 of an intermediate level of force when he deployed his taser in dart-mode, followed by the  
2 application of his taser in drive-stun mode, with two subsequent taser reactivations, all in  
3 rapid succession, was unreasonable and therefore constitutionally excessive. *See Mattos*,  
4 2011 WL 4908374, at \*9-10 (*comparing Bryan*, 630 F.3d at 832 (holding that the plaintiff  
5 alleged a constitutional violation where he was tased in dart mode even though he “was  
6 neither a flight risk, a dangerous felon, nor an immediate threat”) and *Parker v. Gerrish*,  
7 547 F.3d 1 (1st Cir. 2008) (upholding a jury verdict for excessive force used against a  
8 driver stopped for speeding who admitted to drinking, exchanged hostile words with an  
9 officer, and initially resisted arrest before being tased), with *Cook v. City of Bella Villa*,  
10 582 F.3d 840 (8th Cir. 2009) (finding no excessive force where a lone officer tased a  
11 passenger of a car after he pulled the car over around midnight, three people got out of the  
12 car and immediately started yelling at the officer, and one passenger took a threatening  
13 step toward the officer)). A jury might draw inferences different from those that this court  
14 must entertain on a motion for summary judgment. Nonetheless, accepting the evidence  
15 in the light most favorable to Mr. Baird, whether the force employed by Deputy Ehlers  
16 was objectively reasonable, is a question of fact ordinarily reserved for the jury.

## 17 **2. Clearly Established Law**

18 Having determined that Mr. Baird has alleged a viable Fourth Amendment  
19 violation, the court must next consider whether Deputy Ehlers is nevertheless entitled to  
20 qualified immunity because the constitutional violation described above was not  
21 “‘sufficiently clear’ that every ‘reasonable official would have understood that what he  
22 [was] doing violate[d] that right.” *Ashcroft v. Al-Kidd*, --- U.S. ---, 131 S.Ct. 2074, 2083

1 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The alleged violation  
2 did not occur until November 23, 2009. The Ninth Circuit did not declare that a taser used  
3 in dart mode constituted an intermediate use of force, and that the use of that weapon in an  
4 analogous factual situation violated the Fourth Amendment, until the court's 2010  
5 decision in *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010). Further, the Ninth  
6 Circuit's opinion in *Mattos*, analyzing the reasonableness of an officer's use of a taser in  
7 drive-stun mode, was not issued until just this past month. *See Mattos*, 2011 WL  
8 4908374.

9 In *Bryan*, the Ninth Circuit granted the officers qualified immunity precisely  
10 because the state of the law surrounding taser use was acknowledged to be murky as of the  
11 date of the violation. *Id.* at 833; *see also Mattos*, 2011 WL 4908374, at \*12 (“[A]lthough  
12 [the plaintiff] has alleged an excessive force claim, the law [regarding reasonable use of a  
13 taser] was not sufficiently clear at the time of the incident [in 2004] to render the violation  
14 clearly established.”). Although the events of this case occurred years after the events in  
15 either *Bryan* or *Mattos*, little binding, on-point case law was issued between when the  
16 incidents occurred in those two cases and November 23, 2009. *See, e.g., Groves v. Croft*,  
17 No. CV 10-101-BLG-RFC-CSO, 2011 WL 5509028, at \*30 (D. Mont. Nov. 10, 2011) (As  
18 of the date the officers shot [the plaintiff] with a taser in dart mode . . . no U.S. Supreme  
19 Court or Ninth Circuit decision addressed the use of a taser in dart mode.”); *Quyen Kim*  
20 *Dang v. City of Garden Grove*, No. SACV 10-00338 DOC (MLGx), 2011 WL 3419609,  
21 at \*9 (C.D. Cal. Aug. 2, 2011). Given the lack of clarity in the case authority prior to the  
22 Ninth Circuit's rulings in *Bryan* and *Mattos*, the court declines to find that a per se

1 proscription against taser use in situations like the one at hand was clearly established as  
2 of November 23, 2009.

3       Nevertheless, at oral argument, counsel for Mr. Baird argued that Deputy Ehlers  
4 was on notice that use of his taser would be unreasonable based on Magistrate Judge  
5 James P. Donohue's August 31, 2007 ruling in *Beaver v. City of Federal Way*, 507 F.  
6 Supp. 2d 1137 (W.D. Wash. 2007). The court concludes otherwise. The facts in *Beaver*  
7 are quite distinct from those at issue here. The plaintiff was a burglary suspect whom the  
8 officer found running from the scene. When the plaintiff refused to comply with his  
9 command to halt, the officer fired and struck the plaintiff with the first of five taser  
10 deployments. *Id.* at 1140. The plaintiff fell to the ground, but then propped himself up on  
11 his elbows. *Id.* at 1141. The officer fired again, and the plaintiff fell to the ground. *Id.*  
12 Before the second tasing, and after each firing of his taser, the officer commanded the  
13 plaintiff to lie on his stomach and extend his arms out to his sides. *Id.* The *Beaver* court,  
14 held that the first three tasings of the suspect were objectively reasonable. *Id.* at 1145.  
15 The court based this ruling largely on facts that the officer was alone with a felony  
16 suspect, who was under the influence of controlled substances, who had ignored the  
17 officer's commands to stop, and who was attempting to rise and flee. *Id.* The final two  
18 tasings, however, occurred after another officer had arrived on the scene. *Id.* at 1142. This  
19 factor weighed heavily in the *Beaver* court's analysis of the final two tasings. *Id.* at 1145  
20 ("The analysis changes, however, with the arrival of [the second officer]."). Ultimately,  
21 the court concluded that these last two tasings were not objectively reasonable. *Id.* at  
22 1146.

1 The fact that the *Beaver* court found that the final two tasings were unreasonable  
2 would not provide Deputy Ehlers with clear guidance concerning his circumstances  
3 because the court's analysis so heavily relied upon the presence of a second officer.  
4 Further, the court's conclusion that the first three tasings were objectively reasonable also  
5 would not provide clear guidance because the facts of the two cases are so disparate. In  
6 *Beaver*, the plaintiff was a felony suspect actively trying to flee the scene, while Deputy  
7 Ehlers was confronted with a highly intoxicated misdemeanor suspect who was not  
8 actively trying to flee or resist arrest. The fact that use of the taser (the first three times)  
9 was objectively reasonable in *Beaver* would not render its use clearly unreasonable in the  
10 circumstances confronting Deputy Ehlers. Accordingly, the court finds that a reasonable  
11 officer in Deputy Ehlers's shoes could have believed that use of his taser was permissible.  
12 For the foregoing reasons, the court grants Defendants' motion for summary judgment  
13 concerning Deputy Ehlers's qualified immunity with respect to Mr. Baird's federal 42  
14 U.S.C. § 1983 claim.

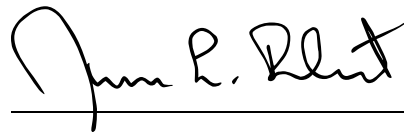
#### 15 IV. CONCLUSION

16 Based on the foregoing, the court GRANTS in part Defendants' motion for  
17 summary judgment with regard to the issue of Deputy Ehlers's qualified immunity with  
18 respect to Mr. Baird's 42 U.S.C § 1983 claim. The remainder of Defendants' motion for  
19 summary judgment (Dkt. # 24) is DENIED as MOOT based on the court's order (Dkt. #  
20 53) granting the parties' November 17, 2011 stipulated motion dismissing Mr. Baird's  
21  
22



1 state law claims (Dkt. # 53). The court also DENIES as MOOT Mr. Baird's motion for  
2 partial summary judgment (Dkt. # 21) based on the same court order (Dkt. # 53).

3 Dated this 20th day of November, 2011.

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7 JAMES L. ROBART  
8 United States District Judge  
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